No. 10,507

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

WARREN H. PILLSBURY, as Deputy Commissioner for the 13th Compensation District under the Longshoremen's and Harbor Workers' Compensation Act,

Appellant,

vs.

LIBERTY MUTUAL INSURANCE COMPANY, a Mutual Insurance Company, and CONTRACTORS PACIFIC NAVAL AIR BASES, an Association,

Appellees.

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

BRIEF FOR APPELLEES.

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BRIEF FOR APPELLEES.

JURISDICTIONAL STATEMENT.

This Court has jurisdiction to entertain this appeal by virtue of the provisions of Section 128 of the Federal Judicial Code (Sec. 225 (a), Title 28 U. S. C. A.) in view of the Petition for Appeal filed June 23, 1943 (R. 63), the order allowing appeal filed June 24, 1943

(NOTE): Throughout this brief italics are ours unless otherwise indicated.

(R. 64), and the Citation and Admission of Service filed June 24, 1943. (R. 65.) Said Section 128 provides in part as follows:

> "The Circuit Court of Appeals shall have appellate jurisdiction to review by appeal final decisions——
>
> First—In the District Courts, in all cases save where a direct review of the decision may be had in the Supreme Court under Section 345 of this title. * * *"

As stated in the Brief for Appellant this case arises upon a bill of complaint for judicial review of a compensation order filed pursuant to the provisions of Section 21 (b) of the Longshoremen's and Harbor Workers' Compensation Act (44 Stat. 1924; U. S. C., Title 33, Chapter 18, Sec. 901, *et seq.*), as made applicable to persons employed at certain defense bases by the Act of August 16, 1941 (55 Stat. 622; 42 U. S. C. A., Secs. 1651-1654), hereinafter called "Defense Bases Act."

Section 21(b) of the Longshoremen's Act, *supra,* provides as follows:

> "If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order, and instituted in the Federal district court for the judicial district in which the injury occurred * * *."

Section 3(b) of the Defense Bases Act, *supra,* provides as follows:

> "Judicial proceedings provided under sections 18 and 21 of the Longshoremen's and Harbor Workers' Compensation Act in respect to a compensation order made pursuant to this Act shall be instituted in the United States district court of the judicial district wherein is located the office of the deputy commissioner whose compensation order is involved if his office is located in a judicial district, and if not so located, such judicial proceedings shall be instituted in the judicial district nearest the base at which the injury or death occurs."

STATEMENT OF THE CASE.

Appellant's Statement of the Case should be amended so far as its present wording conveys the inference that the contract of employment out of which this compensation claim arose was made in Colorado. The earlier contract had been terminated at the time of the accident in question. The contract made in California, effective May 14, 1942, will be found on pages 38 to 43 of the Record.

Also, it should be noted that appellant speaks of the employee, Keil, as though to convey the idea that Keil had temporarily absented himself from his work for the purpose of eating when he was injured. The words used are: "He went out to supper."

Keil had not worked that day, which was Sunday. His own story of the matter was that he and his companion first dined at the Acme Cafe, on San Pablo Avenue, Oakland, near 15th or 16th Street. That they walked up to Lake Merritt from the hotel and then back to town, ending up at Seventh and Franklin Streets, where the accident occurred. This was down by the fishermen's dock. (R. 50-51.)

SUMMARY OF ARGUMENT.

1. The award was annulled in view of the law and the facts of this case, which permitted no other action.

2. Comment on cases dealing with the phase of workmen's compensation law here under review.

3. Appellant, as Deputy Commissioner for the 13th Compensation District, was without jurisdiction to make the award, for the reasons hereinafter specified.

ARGUMENT.

I.

THE AWARD WAS ANNULLED IN VIEW OF THE LAW AND THE FACTS OF THIS CASE, WHICH PERMITTED NO OTHER ACTION.

The paragraph of the Longshoremen's and Harbor Workers' Compensation Act defining "injury" is as follows:

"Sec. 2. When used in this act—* * *

(2) The term 'injury' means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the wilful act of a third person directed against an employee because of his employment."

It is not, of course, contended by anyone in the instant case that respondent Keil was injured while actually working at his trade, while riding on a stage or train in transit from Denver to Oakland, while riding from a stage or train to his hotel, while in a street car or other conveyance en route to or from the docks from which he was to sail. Such circumstances, if they existed, would make a different case.

When injured the employee was completely master of his own time, course and movements. He was exposed to no greater danger or risk because of his employment than was any other pedestrian near Seventh and Franklin Streets at the time of the accident.

The only manner in which the employee's injury can be connected with his employment is by statement of the obvious fact that if Charles F. Keil, Jr. had not been employed by Contractors Pacific Naval Air Bases for service in Hawaii, he would not have left Denver and consequently would not have been at Seventh and Franklin Streets, Oak-

land, at the time of the accident. This circumstance or condition alone, however, does not create legal liability:

> "In answer to the suggestion that the employee would not have been injured if he had not been at the place of employment, it has been said that in the same causative sense, if he had not come into being he could not have been injured, and that the same argument might be made for a claim against one who sold a carriage to one who was struck by lightning while riding in it."
>
> *Mobile & O. R. Co. v. Industrial Commission,* 28 Fed. (2d) 228, 231.

To the same effect:

> *Storm v. Ind. Acc. Com.,* 191 Cal. 4, 6, 7, 214 Pac. 874.

Law as to traveling employees.

> "The mere fact that the employee is required to travel in order to perform his contract of service does not necessarily make every accident which occurs to him industrial. The test is the same for him as it is for all other employees—he must have been injured by an industrial hazard while performing service called for by his contract of hire. *Thus an injury to a traveling salesman returning from the theater to the hotel is not compensable.*
>
> The same is true where the employee is crossing the street in front of his hotel in order to buy a home-town newspaper, or is on a boat ride.
>
> If the employee is required to travel upon the street or highway or must use other means of transportation in the discharge of his duties, and

while so doing, in the performance of a service for his employer, suffers an injury caused by his traveling, he is entitled to compensation benefits. While engaged in this type of work he is protected when on the highway in the course of his duties, regardless of whether he is then journeying to his next place of service or is returning to his business headquarters or to his home."

Campbell on Workmen's Compensation, Vol. I, pp. 191, 192.

And in another Federal case it has been said:

"It is sufficient to say that an injury is received 'in the course of' the employment when it comes while the workman is doing the duty which he is employed to perform. It arises 'out of' the employment, when there is apparent to the rational mind upon consideration of all the circumstances, a causal connection between the condition under which the work is required to be performed and the resulting injury. Under this test, if the injury can be seen to have followed as a natural incident of the work and to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment, then it arises 'out of' the employment. But it excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause and which comes from a hazard to which the workman would have been equally exposed apart from the employment. The causative danger must be peculiar to the work, and not common to the neighborhood. It must he incidental to the character of the business and not independent of the relation of master and servant. It need not have

been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence."

Mich. Transit Corp. v. Brown, 56 Fed. (2d) 200, 202.

II.

COMMENT ON CASES DEALING WITH THE PHASE OF WORKMEN'S COMPENSATION LAW HERE UNDER REVIEW.

There are many phases of compensation law, and cases in one distinct class afford little help when compared with cases in another class.

For instance on page 29 of his brief appellant directs attention to a number of "waiting time" cases, especially *Cardillo v. Hartford, etc.,* 109 Fed. (2d) 674, where a driver went out of his way at lunch time and while returning from that journey was injured, later recovering compensation. The claimant Keil in the instant case was not driving his employer's automobile at the time he was hurt, but was walking around Oakland at his own direction and pleasure for a stroll after dinner—a dinner, by the way, not paid for by the employer or eaten at a place designated by him. The dinner had no causal connection with the accident.

Voehl v. Indemnity Ins. Co. of North America, 288 U. S. 162, 169, 77 L. Ed. 676 (Appellant's Brief, p. 15) is a leading case by way of exception to the general rule that injuries sustained by employees going to or returning from work are not deemed to arise out

of and in the course of their employment. Voehl had charge of a refrigeration plant in Washington, D. C. He was often called to the plant on Sundays and at odd times in emergency. By his contract of employment it was agreed he should be paid a specific hourly wage from the time he left home, and five cents a mile for use of his automobile. Summoned for work on a Sunday, Voehl was injured in an automobile accident. The Supreme Court held this to be an exception to the going and coming rule and reversed the lower court, which had held the accident not compensable. The Voehl case, however, is in no sense on all fours with the one at bar.

In *Lamm v. Silver Falls Timber Co.,* 133 Or. 468, 286 Pac. 527, the employee was injured while returning from town on his employer's logging train which the employees habitually used in order to get to the mill at all. This use was with the knowledge and consent of the logging company, and the injuries were found compensable.

Appellant's table of authorities covers five pages, yet so far as appellees have been able to detect, there is not among all these cases a single one wherein a workman's injuries have been declared compensable when they occurred, as here, on a non-working day; while he was on no errand for his employer; while he was boarding himself and eating where and when he pleased; while he was not engaged in travel movements incident to his employment, was not in any way under his employer's direction at the time he was injured, and was not injured by an instrumentality owned or controlled by the employer.

In other words: A compensable injury case is not presented by a man traveling from the mainland to Honolulu with fare paid, when he is run down by an automobile on the streets of Oakland while strolling about for his own pleasure. His fare from Denver to Oakland had been paid and he was awaiting his employer's orders to proceed on board ship. That was the sole causal relation of workman to injury.

For additional authorities see:

Torrey v. Ind. Acc. Com., 132 Cal. App. 303, 22 Pac. (2d) 525 (traveling inspector drowned while taking boat ride for his own pleasure);

Morgan v. Hoage, 72 Fed. (2d) 727 (as to what is "course of employment");

Gompert v. London Acc. Guar. Co., 100 Fed. (2d) 352.

And for more pertinent cases and detailed discussion of the questions involved see:

Mobile and O. R. Co. v. Ind. Com., 28 Fed. (2d) 228, supra;

Campbell on Workmen's Compensation, Vol. 1, pp. 103-113.

III.

APPELLANT, AS DEPUTY COMMISSIONER FOR THE 13TH COMPENSATION DISTRICT, WAS WITHOUT JURISDICTION TO MAKE THE AWARD FOR THE REASONS HEREINAFTER SPECIFIED.

In annulling the award herein the District Court filed no opinion. Therefore it cannot certainly be said whether the court merely depended upon the fact

that the Defense Bases Act of 1941 did not by its own terms purport to be operative in the continental United States, or went further and considered constitutional grounds, or both. (The Defenses Bases Act is printed as an appendix hereto.)

As to the Act itself no argument is necessary. It distinctly provides that it shall be operative only "outside the Continental limits of the United States."

Keil was hired in California by a California contractor. The relationship thereafter developing was of the state, not the nation, for no federal territory was involved.

> "The granting or denial of compensation by the commissions, boards, bureaus and courts is based principally upon the following legal theories or statutory requirements or a combination of both:
>
> 1. The compensation law of the place of the making of the contract becomes a part of the contract of employment and that law is *exclusively* applicable.
>
> 2. The law of the place of the accident is applicable, regardless of where the contract was made, *because the workmen's compensation law is a police power measure* or because that state has a superior governmental interest, especially if the injured employee is also domiciled there or may there become a public charge.
>
> 3. Both the law of the place of the making of the contract and the law of the place of the accident are applicable.
>
> 4. The law of the situs of the employing industry is applicable.

5. The law of the forum is not applicable when neither the contract was made there nor the accident occurred there."

Schneider's Workmen's Compensation, Third Edition, Text Vol. 1, Sec. 155, p. 447.

"The constitutionality of the provisions of the California statute awarding compensation for injuries to an employee occurring within its borders, and for injuries as well occurring elsewhere, when the contract of employment was entered into within the state is not open to question."

Pacific Employers Ins. Co. v. Industrial Accident Commission, 306 U. S. 493, 59 S. Ct. 629 (1939), on certiorari to the Supreme Court of California, 10 Cal. (2d) 567, 75 Pac. (2d) 1058.

The Commission could have no greater territorial jurisdiction than given it by Congress.

In making an award for an injury occurring on California soil the Commission acted beyond any power delegated to it by Congress (for the Commission is but a Court under another name).

"Courts are constituted by authority and they cannot go beyond the power delegated to them. If they act beyond that authority, and certainly in contravention of it, their judgments and orders are regarded as nullities. They are not voidable, but simply void, and this even prior to reversal. Elliott v. Peirsol, 1 Pet. 328, 340, 7 L. Ed.

104; Old Wayne Life Ass'n v. McDonough, 204 U. S. 8, 27 Sup. Ct. 236, 51 L. Ed. 345."

Vallely v. Northern Fire and Marine Ins. Co., 254 U. S. 348, 41 S. Ct. 116, 65 L. Ed. 297.

"Chief Justice Marshall has said that 'Courts which originate in the common law possess a jurisdiction which must be regulated by their common law, until some statute shall change their established principles; but Courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction." (Citing cases.)

Kentucky v. Powers, 201 U. S. 1, 26 S. Ct. 387, 50 L. Ed. 633, 644.

Jurisdiction cannot be conferred and may be invoked at any time:

"As the Supreme Court finds its jurisdiction in the Constitution and all other Federal Courts in acts of Congress in concurrence with the Constitution, no mere act of the parties to litigation can confer jurisdiction, in contradistinction to venue, upon any Court of the Union. In other words, if a Federal Court would not otherwise have jurisdiction of a given case or a particular matter, it cannot acquire it by consent of the parties; and the incumbents of the Court cannot act as to such matters as a Court, for if the record of the Court does not show jurisdiction it is the duty of the Court of its own motion to refuse to exercise it.

However, the parties may admit the existence of facts which show jurisdiction, so that the Courts may act judicially on such admission: but as the jurisdiction must be based upon a state of facts, an admission contrary to the facts does not give jurisdiction."

Hughes on Federal Practice, Vol. I, p. 198, citing

Kaigler v. Gibson, 264 Fed. 240 (D. C. Ga. 1920).

"It is the duty of the Supreme Court to reverse any judgment given below, and remand the cause, with costs against the party who wrongfully invoked jurisdiction. Graves v. Corbin, 132 U. S. 571, 10 S. Ct. 196, 33 L. Ed. 462, 469; Williams v. Nottawa Twp., 104 U. S. 209, 26 L. Ed. 719.

Where the question of jurisdiction, although not raised by either party in either Court, is presented by the record, it must be considered. Chapman v. Barney, 129 U. S. 677, 9 S. Ct. 426, 32 L. Ed. 800, 801."

Honnold on Supreme Court Law, Vol. 2, p. 1410, citing many cases.

In view of the foregoing facts and authorities it is respectfully submitted that the order and decree of

the United States District Court setting aside the compensation order and award should be affirmed.

Dated, San Francisco,
December 3, 1943.

THEODORE HALE,
CARROLL B. CRAWFORD,
Proctors for Appellees.

(Appendix Follows.)

Appendix.

(42 U. S. C. A. 1651-1654.)

[Public Law 208—77th Congress]

[Chapter 357—1st Session]

[S. 1642]

AN ACT

To provide compensation for disability or death resulting from injury to persons employed at military, air, and naval bases acquired by the United States from foreign countries, and on lands occupied or used by the United States for military or naval purposes outside the continental limits of the United States, including Alaska, Guantanamo, and the Philippine Islands, but excluding the Canal Zone, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That except as herein modified, the provisions of the Act entitled "Longshoremen's and Harbor Workers' Compensation Act", approved March 4, 1927 (44 Stat. 1424), as amended, and as the same may be amended hereafter, shall apply in respect to the injury or death of any employee engaged in any employment at any military, air, or naval base acquired after January 1, 1940, by the United States from any foreign government or any lands occupied or used by the United States for military or naval purposes in any Territory or possession outside the continental United States, including Alaska, Guantanamo, and the Philippine Islands, but excluding the Canal Zone, irrespective of the place where the injury or death occurs.

SEC. 2. (a) That the minimum limit on weekly compensation for disability, established by Section 6 (b), and the minimum limit on the average weekly wages on which death benefits are to be computed, established by Section 9 (e), of the Longshoremen's and Harbor Workers' Compensation Act, approved March 4, 1927 (44 Stat. 1424), as amended, shall not apply in computing compensation and death benefits under this Act.

(b) Compensation for permanent total or permanent partial disability under Section 8 (c) (21) of the Longshoremen's and Harbor Workers' Compensation Act, or for death under this Act to aliens and non-nationals of the United States not residents of the United States or Canada shall be in the same amount as provided for residents, except that dependents in any foreign country shall be limited to surviving wife and child or children, or if there be no surviving wife or child or children, to surviving father or mother whom the employee has supported, either wholly or in part, for the period of one year immediately prior to the date of the injury, and except that the United States Employees' Compensation Commission may, at its option or upon the application of the insurance carrier shall, commute all future installments of compensation to be paid to such aliens or non-nationals of the United States by paying or causing to be paid to them one-half of the commuted amount of such future installments of compensation as determined by the Commission.

SEC. 3. (a) The United States Employees' Compensation Commission is authorized to extend com-

pensation districts established under the Longshoremen's and Harbor Workers' Compensation Act, approved March 4, 1927 (44 Stat. 1424), or to establish new compensation districts, to include any area to which this Act applies; and to assign to each such district one or more deputy commissioners, as the Commission may deem necessary.

(b) Judicial proceedings provided under Sections 18 and 21 of the Longshoremen's and Harbor Workers' Compensation Act in respect to a compensation order made pursuant to this Act shall be instituted in the United States district court of the judicial district wherein is located the office of the deputy commissioner whose compensation order is involved if his office is located in a judicial district, and if not so located, such judicial proceedings shall be instituted in the judicial district nearest the base at which the injury or death occurs.

SEC. 4. This Act shall not apply in respect to the injury or death of (1) an employee subject to the provisions of the Act entitled "An Act to provide compensation for employees of the United States suffering injuries while in the performance of their duties, and for other purposes", approved September 7, 1916 (39 Stat. 742), as amended; (2) an employee engaged in agriculture, domestic service, or any employment that is casual and not in the usual course of the trade, business, or profession of the employer; and (3) a master or member of a crew of any vessel.

Approved, August 16, 1941.